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IN THE

Supreme Court of the United States

October Term, 1970
No. 872

RAILWAY LABOR EXECUTIVES' ASSOCIATION, FRANK CARTHY, *et al.*,

Petitioners,

vs.

THE ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY,

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

Respondent The Atchison, Topeka and Santa Fe Railway Company (hereinafter sometimes called "Santa Fe") presents herewith its Brief in Opposition to the Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit filed herein by Petitioners Railway Labor Executives' Association and others.

Questions Presented.

Santa Fe does not dispute the nature of the basic question presented by the Petition for Writ of Certiorari, to wit: whether or not the dispute involved in this case is properly referrable to the National Railroad Adjustment Board, as the Court of Appeals held. Santa Fe does point out, however, that it denies that

it violated any federal statute (the District Court expressly found Santa Fe had not done so—Appendix B, p. 7 a to Petition for Writ) and that there are several grounds in support of the judgment in the District Court in this matter which were not decided by the Court of Appeals but which fully support such judgment, whether or not the dispute is properly denominated a "minor labor dispute".

REASONS FOR DENYING WRIT.

1. The Decision Below Is Not in Conflict With Prior Decisions of Other Courts of Appeals and This Court.

Petitioners assert that the decision of the Court of Appeals below is in conflict with *United Workers of SUI v. Galveston Wharves,* (5th Circuit, 1968), 400 F. 2d 320 and *Mungin v. Florida East Coast Railway Co.,* (5th Circuit, 1969) 416 F. 2d 1169. Petitioners point to no decisions of the Supreme Court as to which such a direct conflict is alleged. Both *Galveston Wharves* and *Mungin* involved a situation in which it was found that the carrier violated Sections 2 and 6 of the Railway Labor Act, 45 U.S.C. 152 and 156, by making a change in wages, hours and working conditions of railroad employees without serving so-called "Section 6 Notices" seeking to negotiate on such changes and by refusing to negotiate on such changes when the Union requested it to do so. In both cases the Court of Appeals for the 5th Circuit, in reversing District Court decisions, held that a dispute over a change in conditions was a "major dispute" (a manifestly correct conclusion), that the carrier should be required to negotiate over such changes and maintain the *status quo* pending such negotiations and that *as a sanction*

to insure the carrier's fulfillment of its obligations the District Court had jurisdiction to and should order the payment of back wages to the affected employees. In *Galveston Wharves* and *Mungin* a major dispute was involved all the way and the only question was whether or not in enforcing the carrier's obligations pending the resolution of such major dispute sanctions in the form of back wages should also be ordered. This is quite different from the present situation where the issue is whether or not employees are entitled, under existing agreements, to continued employment on the discontinued passenger trains for the duration of the thirty-day notice period, or compensation in lieu thereof.

There is no assertion by Petitioners in their complaint, proof or briefs in the Courts below that the carrier was obligated to negotiate with them before discontinuing the trains in question and it is a little late now for them to assert that this dispute is over a change in working conditions. Rather than being comparable to *Galveston Wharves* and *Mungin* the present case is, as stated by the Court of Appeals, similar to *Missouri, Kansas, Texas RR (MKT) v. Brotherhood of Railroad Trainmen,* (5th Circuit, 1965) 342 F. 2d 295, where a dispute over a railroad's alleged failure to correct hazardous conditions was held properly referrable to the Adjustment Board despite the silence of a collective bargaining agreement as to terms governing unsafe working conditions. This case, like *MKT* and unlike *Galveston Wharves* and *Mungin,* clearly involves a claim to rights accrued, not to have new ones created for the future, and represents a minor dispute (*Elgin, Joliet and Eastern Railway v. Burley,* (1945) 325 U.S. 711, 89 L. Ed. 1886, 65 S. Ct. 1282)

Santa Fe does not perceive the significance of the citation by Petitioners of *Slocum, Koppal* and *Walker*[1] and the other cases cited on pages 7 and 8 of the Petition, but points out that the cases which hold that a discharged employee may sue for damages for wrongful discharge (a right narrowly limited by *Koppal* and others) start with the decision in the case of *Moore v. Illinois Central RR Co.*, 312 U.S. 630, 85 L. Ed. 1089, 61 S. Ct. 754, which held that where an employee has been discharged he may treat his employment relationship as having been terminated and elect to sue for damages for a wrongful discharge. These cases consequently provide no precedent for an action for damages by employees who are still employees. The present case does not involve a wrongful discharge.

Other cases cited by Petitioners either have no relevance or involve situations where the applicable statute expressly provides for a damage action in the federal court, as in the case of an action to recover unpaid minimum wages under the Fair Labor Standards Act (*Williamson v. Jacksonville Terminal Co.*, 315 U.S. 386).

What the employees sought in this action was compensation in lieu of continued employment throughout the 30 day period of the notices. Whether or not they were entitled to such continued employment or compensation—either as express or as implied rights under the bargaining agreements—is a matter which the Adjustment Board is qualified to and should determine. The decision might well, as suggested by the Court of Appeals, involve looking into usage, custom and practices of the industry. It did not necessarily involve a le-

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[1]*Slocum v. Delaware L. & W. R. Co.*, 339 U.S. 239; *Transcontinental & Western Air., Inc. v. Koppal*, 345 U.S. 653; *Walker v. Southern Ry. Co.*, 385 U.S. 196.

gal decision as to whether or not Santa Fe had violated any mandatory obligations under the Interstate Commerce Act. To reiterate, it involved a claim to rights accrued; it did not involve a controversy over new rights (a major dispute) as in *Galveston Wharves* and *Mungin* or a claim for damages by ex-employees of the type involved in *Moore* and *Koppal.*

2. The Decision of the Court Below Did Not Deprive Railway Employees of Reasonable Access to the Courts.

The scheme of the Railway Labor Act as amended in 1966 and as evidenced by the legislative history of the Act, as conceded by Petitioners on page 12 of the Petition, is to create a finality of decisions by the Adjustment Board in the settlement of minor disputes. If this is a minor dispute, Congress has spoken clearly and unequivocally that its final resolution lies with the Adjustment Board. The complaint of Petitioners that the decision of the court below would deprive railway employees of the opportunity to obtain a judicial inquiry is answered by the incontrovertible fact that Congress intended no judicial inquiry.

The employees were not without any judicial remedy in this case, as pointed out in Santa Fe's brief in the Court of Appeals. Petitioners' real grievance is with the Interstate Commerce Commission in dismissing Santa Fe's notices and the complaints of the employees lodged with the Commission. If the Commission was wrong in this action the employees had a judicial remedy by either an attack for error before a three-judge federal court under the provisions of 28 U.S.C. §2321, *et seq.* or a mandamus action in the District of Columbia (*State of New Jersey v. United States,* (DNJ-1959) 168 F. Supp. 324 at 334).

Petitioners are incorrect in their assertion on page 11 of the Petition that §13(a)(1) of the Interstate Commerce Act directly provides for the stability of employment for railroad workers. The cases cited for this proposition in footnote 12 of the Petition relate only to Sections 1(18)—(22) and 5 of the Interstate Commerce Act. As pointed out in Respondent's brief in the Court of Appeals, §13(a)(1) does not provide for employee protection conditions and has been expressly held not to authorize the imposition of such conditions (*The Atchison, Topeka and Santa Fe Railway Co. Discontinuance of Trains*, 333 I.C.C. 569 [1968] and other Commission decisions).

3. The Decision of the District Court Is Correct for Reasons Not Considered by the Court of Appeals and in Any Event This Case Does Not Present Such a Novel and Important Issue as to Require Supreme Court Review.

Even if this Court entertains any doubt about the expressed reasons for the Court of Appeals' decision, there was ample reason for affirming the District Court judgment on grounds not directly considered by the Court of Appeals. The statute in question (§13(a)(1)) contained no mandatory provisions except that a carrier is required to comply with any orders issued by the Commission. No such orders were issued and there was no violation of anything by the Santa Fe. Furthermore, it is quite clear that §13(a)(1) did not create a right in employees to continued employment and in fact did not even authorize or permit the imposition of employment protection conditions, as above stated. Consequently if there were any violation of the Act by the carrier the only ones who could complain were the shipping and traveling public who are not parties to

this action. Additionally, even if Sections 8 and 9 of the Interstate Commerce Act otherwise provided a legal remedy to employees they did so expressly only where the employees had not elected to take their complaint to the Commission—which they did in this case. By doing so they waived any right they might otherwise have to a court action for damages.

Finally, this case arose out of a somewhat unusual set of circumstances not likely to recur and there is no compelling reason for this court to assume jurisdiction.

Conclusion.

For the reasons that there is no conflict between the decision of the Court of Appeals below and decisions of this Court or other Court of Appeals decisions, the Court of Appeals decision is manifestly correct, there are ample other reasons why the District Court judgment should be affirmed and this case clearly does not involve such important issues as to justify Supreme Court review in any event, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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